IN THE SUPREME COURT OF IOWA

NO. 12-2120

CHRISTOPHER J. GODFREY,
Plaintiff-Appellant,

v.

STATE of IOWA; TERRY BRANSTAD, Governor of the State of Iowa, individually and in his official capacity; KIMBERLEY REYNOLDS, Lieutenant Governor of the State of Iowa, individually and in her official capacity; JEFFREY BOEYINK, Chief of Staff to the Governor of the State of Iowa, individually and in his official capacity; BRENNA FINDLEY, Legal Counsel to the Governor of the State of Iowa, individually and in her official capacity; TIMOTHY ALBRECHT, Communications Director to the Governor of the State of Iowa, individually and in his official capacity; and TERESA WAHLERT, Director, Iowa Workforce Development, individually and in her official capacity.

Defendants-Appellees

On Appeal from the District Court for Polk County
The Honorable Robert A. Hutchison

Brief of the National Governors Association as *Amicus Curiae* in Support of the Appellees

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IDENTITY AND INTEREST OF AMICUS CURIAE

The National Governors Association (NGA) is the collective voice of the Nation's governors. NGA's members are the governors of the 50 states, three Territories, and two Commonwealths. As the elected chief executive officers of their respective states, governors make decisions and take actions on a number of contentious issues during their terms in office. That makes them frequent targets for litigation, which creates distractions and requires significant expenditure of time and money.

Iowa, like most states, has recognized that the costs of these lawsuits are ultimately borne by the State and its citizens. So Iowa, like many states, has provided statutory immunity for public officials who act within the scope of their office or employment. NGA and its members have a compelling interest to ensure that those immunities remain robust, and that they remain an immunity *from suit*.

INTRODUCTION

The Iowa Tort Claims Act provides that if the Iowa Attorney General certifies "that a defendant in a suit was an employee of the state acting within the scope of the employee's office or employment at the time of the incident," then the "suit commenced upon the claim shall be deemed to be an action against the state under the provisions of this chapter." Iowa Code

§ 669.5. That language, as Judge Pratt observed in *Mills v. Iowa Board of Regents*, 770 F. Supp. 2d 986, 996 (S.D. Iowa 2011), is "clear[] and unambiguous[]": Once the attorney general certifies that a defendant was acting within the scope of his office or employment, the defendant must be dismissed and the State substituted in his place. There is nothing for the Court to review.

Plaintiff Christopher Godfrey does not like that outcome because Iowa has not waived sovereign immunity for defamation claims or claims for interference with contractual relations—the kind of claims he is bringing in this case. So "[d]espite the clear and mandatory language of § 669.5(2)(a)" (*Mills*, 770 F. Supp. 2d at 994), he argues that a jury should decide the scope-of-employment question—as if this case is just a run-of-the-mill, vicarious-liability lawsuit. Indeed, Plaintiff thinks judicial review (by a jury or, failing that, a judge) is constitutionally required.

Plaintiff's arguments, if adopted, would undermine the purpose of governmental immunity. The Iowa Tort Claims Act gives state employees immunity *from suit* for claims of defamation, breach of contract, and extortion (among others), if the Attorney General certifies that the employee was acting within the scope of his office or employment. But if the scope-of-employment issue becomes, itself, a product of protracted litigation and

fact finding, then the State (and by extension, its citizens) will bear the very costs that the Iowa Tort Claims Act is meant to avoid. The Court should keep those principles in mind when deciding the statutory and constitutional questions presented in this appeal.

But the Court should also be mindful that the issue presented—whether the Attorney General's scope-of-employment certification is reviewable—arises under unusual circumstances in this case. This is not just any lawsuit against any government employee. This is a legal challenge to the actions of a governor—the "supreme executive" of Iowa—and some of his closest advisors. So Plaintiff is correct about one thing: This case does have constitutional implications. But it is the separation of powers, not the Due Process clause, that is in play.

To be sure, those issues have not yet been fleshed out in this lawsuit. (There has been no need, since the language of section 669.5 is plain.) But this Court should bear in mind that state governors, much like the President of the United States, hold a special place in our constitutional framework. They are, in various forms, the heads of a coequal branch of government. And when the judicial branch calls those governors into the courtroom to explain their executive decisions, the line between the two branches of government begins to blur. And so it does here.

ARGUMENT

A. Immunity from suit is designed to protect government employees from the costs of litigation, so the question of immunity cannot, itself, be subjected to full litigation.

A State employee who is acting within the scope of their office or employment cannot be sued for "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, [] interference with contract rights" (Iowa Code § 669.14) or any "functional equivalent" claim. *Trobaugh v. Sondag*, 668 N.W.2d 577, 584 (Iowa 2003). If a plaintiff brings that type of claim, a court must dismiss it. There is no discovery. There is no trial. The employee is completely immune from suit.

Plaintiff wants to change that. He thinks that a jury should decide whether a defendant employee was acting within the scope of his employment, and that a jury should therefore decide whether the employee is immune from suit. But to state Plaintiff's argument is to expose its weakness. If an employee must face discovery and a full trial just to determine his immunity status, then the immunity is not from suit at all.

State employees make decisions that affect citizens, and those decisions almost always make *someone* unhappy. For that reason, state employees are a frequent target for litigation. Litigants bring those lawsuits

for a variety of reasons: some lack objectivity and do not know that their case is meritless; others understand the long odds, but pursue the case for political cause. Either way, the lawsuits have a very real and detrimental effect on state government.

Defending lawsuits, even frivolous ones, costs money—lots of money. There are attorney costs: The State must either hire a full-time attorney to defend the lawsuit or pay a private attorney by the hour. There are discovery costs: an ever-increasing part of every litigation budget. And there are opportunity costs: An employee who is tied up in trial or at a deposition is, by definition, not working for the State.

But the direct monetary costs may be the least concerning. Rational human beings dislike litigation, and so they will try to avoid it. Indeed, no less than Judge Learned Hand declared that "I should dread a lawsuit beyond almost anything else short of sickness and death." 3 Lectures on Legal Topics, Association of the Bar of the City of New York 105 (1926). That goes double for public officials, who could face litigation around every corner. We need public officials to make decisions based on the facts and relevant policy considerations, not because they fear vexatious litigation.

Vexatious lawsuits can also discourage others from seeking office. Public service is a sacrifice: The pay is relatively low; the time demands are

high; and there is no shortage of critics. If constant fear of litigation is added to the mix, then even the most unselfish individuals may remain on the sidelines of public service.

Of course, not every action against a government employee is meritless. And if it were easy to identify individuals who abuse their power, there would be no justification for sparing them. But "it is impossible to know whether the claim is well founded until the case has been tried," and "to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.). Thus, it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Id.*

To be sure, Plaintiff is not making a direct challenge to governmental immunity. He just wants the jury (or a judge) to decide whether the defendants were acting within the scope of their employment, as the Attorney General certified. That may seem like a benign request. It's not. If a jury decides the scope-of-employment issue, then state employees are really not immune from suit at all. Indeed, the concerns that justify

immunity—the expense of litigation, distraction of officials from their duties, inhibition of discretionary action, and deterrence of able people for public service—will become real. Even if the scope-of-employment decision is reviewable by the court, and not a jury, that review will open the door to vexatious and sometimes political lawsuits. And the scope-of-employment decision itself will become subject to litigation.

It is possible, of course, that at some point Iowa's independently elected attorney general will certify that a defendant was acting within the scope of his employment, when no reasonable person or jurist would agree. That is not desirable, but the courts cannot subject every attorney-general certification to full litigation because of the prospect that some attorney general, some day, may shield a state employee for their personal actions. As discussed above, the same critique could be said of immunity generally. We have no interest in protecting the truly guilty. But to subject the innocent public servants to such litigation is too costly.

Even so, it is unlikely that Iowa's independently elected attorney general would be willing to sacrifice his reputation by protecting an employee who was clearly not acting within the scope of his employment. If he does, that decision will be reviewed by the ultimate jury—the voters.

B. The claims in this case go to the very heart of the chief executive's authority, which raises significant separation-of-powers concerns.

The Iowa Tort Claims Act applies to all government employees. But the defendants in this case are not just any employees. Plaintiff is suing the Governor and his advisors, as well as the Lt. Governor and the Director of the Department of Workforce Development. That makes this case unique. It also makes it a poor one to decide the broader issues that Plaintiff raises.

To begin, there really is no question that the defendants were acting within the scope of their employment. Plaintiff does not (and cannot) contend that the Governor is without authority to set his salary or comment on his performance. So this case is not a proper vehicle for demonstrating the possible ills of attorney-general certification. The actions at issue in this case are core Executive Branch functions.

Plaintiff's real argument is tied to the merits of his claim. He contends that Defendants' motives were improper and that their statements were false, and so he leaps to the conclusion that his claims fall outside the Iowa Tort Claims Act. That's not how scope-of-employment questions work in the immunity context. Once again, Judge Hand said it best:

> The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover

> occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.

Gregoire, 177 F.2d at 581.[1] *See e.g., Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150, 155 (Alaska 1987) ("The critical inquiry is not whether the governor is authorized to make defamatory remarks, but whether he has the authority to engage in the underlying conduct out of which the alleged defamation arises. Such authority, without question, exists here.").

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[1] Justice Harlan said it well too:

> In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals.

Spalding v. Vilas, 161 U.S. 483, 498-99 (1896).

The Iowa Constitution further complicates the scope-of-employment issue, as it comes to the Court in this case. The Governor of Iowa is vested with the "supreme executive power" of the State (Iowa Const. art. IV, § 1), and the Iowa Constitution, like the constitutions of most states, provides that no branch of government may exercise powers properly belonging to another. Iowa Const. art. III, § 1. If, as Plaintiff contends, the scope-of-employment question is presented to a judge or jury for intense fact-finding (Plaintiff says that every case should go to trial because "[e]ven testimony that is unconstroverted may be rejected by the jury" Plt. Br. 24), then the courts are in real danger of encroaching upon the Governor's constitutional authority.

Because of those same separation-of-powers concerns, the U.S. Supreme Court has already ruled that the President is immune from lawsuits like this one. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (quoting Justice Story for the proposition that separation of powers demand that a President be immune "while he is in the discharge of the duties of his office"). And while this Court is, of course, free to interpret the Iowa Constitution differently, there is no reason to do so. The structure of the federal and Iowa constitutions are roughly the same—as far as the separation of powers goes—and the "pressures and uncertainties facing decisionmakers in state

government are little if at all different from those affecting federal officials." *Butz v. Economou*, 438 U.S. 478, 500 (1978).

Moreover, by its own power this Court has already shielded judicial officers from civil suit, even when they are "accused of acting maliciously and corruptly." *Muzingo v. St. Luke's Hosp.*, 518 N.W.2d 776, 777 (Iowa 1994). It would be odd indeed to rule that the head of a coequal branch of government and his advisors are subject to a different, less deferential standard.

Respectfully submitted,

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The undersigned hereby certifies that he or a person acting on his behalf will file the attached Brief by hand delivering eighteen copies to Clerk of the Iowa Supreme Court, Iowa Judicial Branch Building, 1111 E. Court Avenue, Des Moines, Iowa 50319 on June 7, 2013.

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